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In the Supreme Court of the United States

October Term, 1937

No. 316

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California,
Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This appeal from the final judgment of the Supreme Court of California presents the question whether section 14(b) of Article XIII of the California Constitution, as interpreted and applied with respect to the gross premiums receipts tax imposed upon Appellant, violates the 14th Amendment of the Constitution of the United States.

That portion of the provision pertinent to this inquiry reads:

> "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half* per cent upon the amount

*By authority of other provisions of said Article XIII the legislature changed the rate in 1921 (St. 1921, p. 21) to *two and sixty hundredths.*

> of the gross premiums received upon its business done in the state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. . . ."

Section 14(b) as it read at the time of the imposition in question will be found quoted in full in the Appendix at p. 13.

Concisely stated the question decided by the California Supreme Court was whether this tax provision included *reinsurance premiums* paid to Appellant by *other* "authorized" insurance companies where the reinsurance treaty or contract was executed and such reinsurance premium payments thereunder were made at *Hartford, Connecticut.* "Authorized" as used in the provision means licensed to do and doing specified classes of insurance business; having a Certificate of Authority from the Insurance Commissioner of California to transact the insurances specified therein. (R. 30.)

During the calendar year 1930 Appellant received from *other* "authorized" insurers for reinsurance the sum of $416,594.03. In addition thereto it received direct from its own policyholders the sum of $375,460.04 in premiums. (R. 4.) The first mentioned figure represented premiums collected on "policies or contracts of insurance issued" by such other "authorized" insurers to *residents* of California. It is more aptly an inference than direct allegation that such reinsurance premium payments to Appellant may be considered the *result* of

business originally written or done in California. The tax provision limits the deduction from the gross premium receipts to those reinsurance premium payments made to "authorized" insurers. Hence, we are justified, as were the California courts, in stating the inference to be a fact of the case.

The gross premium receipts derived from business done in California is the basis of the tax. The allegations of the complaint (R. 1-9), taken as true, fail to show that the tax was measured by or based upon any premium (reinsurance or direct) receipts other than receipts derived from business originally written in or transacted within the state of California.

The plain facts of the case are these: Appellant, an authorized insurance company, conceived the idea of making a treaty or contract of reinsurance at Hartford, Connecticut, providing therein that all reinsurance premium payments thereunder be made at that place, for the express purpose of claiming that such reinsurance business was not done within the jurisdiction of California; that hence the reinsurance premium receipts derived therefrom could not be included as "gross premium receipts", the base upon which the tax at 2.6% is calculated. It claimed to be exempt from taxation on that part of its reinsurance premium receipts which were paid to it at Hartford, under said reinsurance treaty, by other insurance companies authorized to do business in California, upon the theory that such reinsurance business was not done in the state of California and hence could not be made the basis of the gross premiums receipts tax.

DECISIONS OF CALIFORNIA SUPREME COURT INTERPRETING PROVISION IN QUESTION

Two decisions have been rendered by the Supreme Court of California upon the question whether such reinsurance premium payments were properly included by the taxing authorities as a part of the gross premiums upon which the tax is based. The first is

Connecticut General Life Ins. Co. v. *Johnson*, 3 Cal. (2nd) 83; 43 Pac. (2nd) 278.

in which the appeal to this Court was dismissed for want of a properly presented federal question. See

296 U. S. 535.

The second decision is involved here (R. 27 to 32 inclusive) and will be found reported in

93 Cal. Dec. 399;
67 Pac. (2nd) 675.

Speaking with reference to a company authorized to transact insurance business in California, the Court in the opinion first above mentioned, at page 89, said:

> "* * * No insurer can claim an exemption upon reinsurance premiums paid to an *unauthorized* company. Therefore, to prevent unjust discrimination, the state may not allow the exemption for reinsurance paid to an *authorized* company unless and until it is in a position to claim its uniform percentage of such reinsurance premiums so as to give it in the aggregate the equivalent of the percentage on the original gross premiums paid to the insurer. In short, the transaction is not between 'authorized' companies unless this result follows. Further, any

other construction of the section would not only be unjust discrimination against the domestic companies but would enable foreign companies, by a simple process of reinsurance outside the state, to escape altogether such tax exaction." (Italics ours.)

"We think the argument of respondent is sound and unanswerable. The intent to tax all gross premiums, or their equivalent, must be present or else the whole scheme is discriminatory and unworkable. Appellant is charged with knowledge that the state is entitled to said percentage, or to its equivalent, and also with the further knowledge that the state has this right above and in addition to any additional claims it may have under the so-called 'retaliatory' rights conferred by said section. Appellant, therefore, in order to state a cause of action for a refund must of necessity show that these rights of the state have been fully satisfied. This is but another way of saying that appellant is estopped to deny that said reinsurance was consummated in the state unless and until it can show that the insurer has paid the full tax on gross premiums without exemption, including claims of the state, if any, for retaliatory taxes. This showing appellant failed to make."

"That the term 'reinsurance' premiums is included in the term 'gross' premiums is clear, not only because of the nature of the insurance contract but also from the context of the provision, especially that portion thereof which allows, under certain conditions, a deduction of such payments from 'gross premiums' received, thereby implying their previous inclusion therein. * * *"

In the hearing before the California Supreme Court upon the consolidated cases involved here, Appellant

contended that it was not authorized to transact any reinsurance business in California. This contention will be found fully answered in the opinion (R. 28 to 32 incl.).

ARGUMENT AND AUTHORITIES

It is obvious that the purpose of the tax provision would be defeated had any other interpretation thereof been given. By this simple device of reinsurance outside the state, any number of insurance companies would be enabled to reduce their gross premiums to practically nothing. The only tax the state would be able to impose and collect would be that upon the authorized insurer writing the original policy and retaining all the original premium therefor.

As was aptly said in

Brown v. *Pittsburgh Life and Trust Company* (Ala.) 65 So. 699:

> "A literal interpretation which would defeat the manifest provisions of the statute and permit evasions will not be adopted if any other reasonable construction consistent with such purpose can be given to it * * * If the statute is to be construed as intending to make the basis for the computation of the tax levied only such premiums from resident policyholders as are actually received by the company within the State, then it lies within the power of the company to entirely defeat the tax and the purposes of the statute by hereafter requiring all policyholders in this State to remit their premiums to the home office of the company * * *"

And in

Pittsburgh Life and Trust Company v. *Young* (No. Carolina) 90 S. E. 568, at pages 571 and 572:

"It is not taxation of the receipts, but a tax equal to 2½% on their gross amount * * * The standard is the volume of the earnings and not the method of payment. Any other interpretation would render the legislation nugatory, and disappoint the clear intention of the legislation. * * * But the revenue law shows, without any doubt, that the 'receipts' intended were those derived from its business in this State."

THE TAX IS A FRANCHISE TAX EXACTED FOR THE PRIVILEGE OF DOING BUSINESS IN THIS STATE

In two recent decisions of the Supreme Court of California, and the only decisions affecting the provision in question in respect to the character of the tax thereby imposed, it was said:

"'The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes *upon* property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax *upon* property. Rather, (italics added) *it is a franchise tax exacted for the privilege of doing business in this State* * * *' We therefore hold that the tax on insurance companies levied pursuant to Section 14, Subdivision (b), of Article XIII of the Constitution is an excise or privilege tax and not, as contended by

appellant insurance commissioner a property tax. * * *"

Samuel L. Carpenter, Jr., as Ins. Com. of the State of California, v. *People's Mutual Life Ins. Co. et al.*, 94 Cal. Dec. 674.

The quotation in the above cited case was taken from

Consolidated Title Securities Company v. *Hopkins*, 1 Cal. (2d) 414, at 419.

With reference to a similar tax the Supreme Court of Pennsylvania in the case of

Commonwealth v. *Equitable Life Assurance Society*, 239 Pa. State 288, 86 Atl. 787,

held that the tax there, similar to the imposition here, was upon a privilege actually used and this court in affirming that decision, in

Equitable Life Assurance Society v. *Commonwealth*, 238 U. S. 143,

said:

"The question is not what is *doing business* within a state in such a sense as to lay a foundation for service of process there. It being established that the relation of the foreign company to domestic policyholders constituted doing business within the meaning of the statute, the question is whether the company may be taxed in respect of it in this way, whatever it may be called. *We are dealing with a corporation that has subjected itself to the jurisdiction of the state;* there is no question that the

state has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. * * * The tax is upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. * * *" (Italics ours.)

PROPERTY BEYOND BORDERS OF CALIFORNIA NOT TAXED

As we have shown, the imposition of the tax involved here was not upon property beyond the jurisdiction of California. The appellant has been at all times mentioned in the complaint subject to the jurisdiction of the California taxing authorities. Likewise, all other insurance companies who ceded a portion of their original premium receipts to it were subject to the jurisdiction of the California taxing authorities. The situation is comparable to that dealt with in the case of

Compania de Tabacos v. *Collector*, 275 U. S. 87, at p. 98.

where this question was asked:

"Does the fact, that while the Tobacco Company and the London Company were within the jurisdiction of the Philippines, they made a contract outside of the Philippines for the insurance of merchandise in the Philippines, prevent the imposition upon the assured of a tax of one per cent upon the money paid by it as a premium to the London Company?"

And the question was answered, viz.:

> "This we think must be answered affirmatively under *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143. * * *"

We cannot leave this case without quoting the following pertinent excerpt from the dissenting opinion of the late Mr. Justice Holmes, page 100:

> "* * * The government has the assured within its jurisdiction. I can see no ground for denying its right to use its power to tax unless it can be shown that it has conferred no benefit of the kind that would justify the tax, as is held with regard to property outside of a state belonging to one within it. *Frick* v. *Pennsylvania*, 268 U. S. 473, 489. But here an act was done in the islands that was intended by the plaintiff to be and was an essential step toward the insurance, and, if that is not enough, the government of the islands was protecting the property at the very moment in respect of which it levied the tax. Precisely this question was met and disposed of in *Equitable Life Assurance Co.* v. *Pennsylvania*, 238 U. S. 143, 147.
>
> "The result of upholding the government's action is just. *When it taxes domestic insurance it reasonably may endeavor not to let the foreign insurance escape. If it does not discriminate against the latter, it naturally does not want to discriminate against its own.* * *" (Italics ours.)

Mr. Justice Brandeis concurred in the dissent.

The dissent, however, was not to that portion of the decision of this court referred to as the second point

and found at page 98. It was to the first point in that case with which we are not here concerned.

The decision above we submit is controlling of the question here.

INTERPRETATION OF PROVISION IN QUESTION IS NOT OFFENSIVE TO ANY FEDERAL CONSTITUTIONAL PROVISION AND THEREFORE SHOULD BE AFFIRMED BY THIS COURT

It is the long and well established rule of this court that the decision of the highest court of the state construing one of its own statutes or constitutional provisions if not offensive to a federal constitutional provision is controlling upon this court.

Mutual Reserve Fund Association v. *Phelps,* 190 U. S. 157 at 158;

New York v. *Roberts,* 171 U. S. 659.

CONCLUSION

It will be noted that the tax imposition in no way involves the control of any contract executed beyond the borders of California. Freedom of contract is, therefore, not involved. All that is involved is the question of what are the gross premium receipts of an insurance corporation by which a tax is measured and imposed, the insurance corporation admittedly being within the jurisdiction of the state and the portion of such premium receipts admittedly having been derived from business originally transacted within the state. Was it not proper for the California tax authorities to use such receipts as the basis upon which the tax in question was

imposed? We submit the question should be answered affirmatively.

Respectfully submitted,

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APPENDIX

Article XIII, Section 14b:

"Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies except county and municipal taxes on real estate, and except as otherwise in this section provided; provided, that when by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the legislature upon insurance companies of such other state or country doing business in this state."

p. 1, 4.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1937.

Connecticut General Life Insurance Company, Appellant, *vs.* Charles G. Johnson, as Treasurer of the State of California. } Appeal from the Supreme Court of the State of California.

[January 31, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by California on the receipt by appellant in Connecticut of the insurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment.

In suits brought in the state court by appellant against respondent, state treasurer, to recover the taxes paid, the Supreme Court of California sustained demurrers to the complaints and gave judgments for the respondent. The cases, having been consolidated, come here on a single appeal under § 237 (a) of the Judicial Code. 28 U. S. C. § 344 (a).

Section 14 of Art. XIII of the California constitution, as supplemented by Act of March 5, 1921 (Stats. 1921, c. 22, pp. 20, 21, Political Code, § 3664b), fixing the rate of tax, lays upon every insurance company doing business within the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state. . . ." The Supreme Court of California has declared that the constitutional provision imposes "a franchise tax exacted for the privilege of doing business" in the state. *Consolidated Title Securities Co.* v. *Hopkins*, 1 Cal. (2d) 414, 419; compare

Carpenter v. *People's Mutual Life Insurance Co.*, 94 Cal. Dec. 674.

Although in terms the "gross premiums received upon . . . business done in this state", less the specified deductions, are made the measure of the tax, the state court in this, as in an earlier case, *Connecticut General Life Insurance Co.* v. *Johnson*, 3 Cal. (2d) 83 (appeal dismissed for want of a properly presented federal question, 296 U. S. 535), has held that the measure includes the premiums on appellant's reinsurance policies effected and payable in Connecticut. In this case it has declared also that the policy of the state, expressed in the constitutional provision, is "to avoid double taxation without any loss of revenue to the state". To accomplish that end the deduction of reinsurance premiums paid to companies authorized to do business within the state is allowed, it is said, on the theory that the benefit of the deduction will be passed on to the reinsurer who, being authorized to do business within the state, may be taxed on the reinsurance premiums as a means of equalizing the tax and as an offset against the benefit of the deduction which he ultimately enjoys.

No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut General Life Insurance Co.* v. *Johnson, supra*, to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; *compare Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*, 262 U. S. 544.

It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transac-

tions are so related to business carried on by appellant in California as to be a part of it and properly included in the measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions.

But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 494; *New York Life Insurance Co.* v. *Head*, 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346; *Compañia De Tabacos* v. *Collector*, 275 U. S. 87; *Home Insurance Co.* v. *Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Boseman* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co.* v. *Graves*, 274 N. Y. 312; compare *Provident Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insur-*

ance Co. v. *Johnson, supra,* 87; compare *Morris & Co.* v. *Skandinavia Insurance Co.,* 279 U. S. 405, 408. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 398. Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state, *Equitable Life Assurance Society* v. *Pennsylvania,* 238 U. S. 143, and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege, *Compañia De Tabacos* v. *Collector, supra,* 98, there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state. *Provident Savings Life Assurance Society* v. *Kentucky, supra,* 112; *Compañia De Tabacos* v. *Collector, supra,* 96; compare *Equitable Life Assurance Society* v. *Pennsylvania, supra,* 147; *Compañia De Tabacos* v. *Collector, supra,* 98. All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1937.

Connecticut General Life Insurance Company, Appellant, *vs.* Charles G. Johnson, as Treasurer of the State of California. } Appeal from the Supreme Court of the State of California.

[January 31, 1938.]

Mr. Justice Black, dissenting.

I do not believe that this California corporate franchise tax has been proved beyond all reasonable doubt to be in violation of the Federal Constitution[1] and I believe that the judgment of the Supreme Court of California should be affirmed. Traditionally, states have been empowered to grant or deny foreign corporations the right to do business within their borders,[2] and " . . . may exclude them arbitrarily or impose such conditions as . . . (they) will upon their engaging in business within (their) . . . . jurisdiction."[3]

California laid an annual tax upon gross insurance premiums which the Supreme Court of California has construed to be "a franchise tax exacted for the privilege of doing business." In measuring this franchise tax imposed upon corporations the state includes reinsurance premiums paid to the corporation on contracts made without the state, *where such reinsurance protects citizens of the State of California.* There is no attempt by this tax to regulate the business of the insurance company in any state except California.

The record does not indicate that California made any contract with this Connecticut corporation guaranteeing it a permanent

[1] Cf. Ogden *v.* Saunders, 12 Wheat. 213, 270.

[2] Bank of Augusta *v.* Earle, 13 Pet. 519; Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 Wall. 410; Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

[3] Hanover Insurance *v.* Harding, 272 U. S. 494, 507.

franchise to do business in California on the same terms and conditions upon which it entered the state.

"A state which freely granted the corporate privilege for intrastate commerce may change its policy. . . . . , in the absence of contract, there is no vested interest which requires the continuance of a legislative policy however expressed—whether embodied in a charter or in a system of taxation."[4]

It may be that California believes that by this tax it can stimulate the reinsurance business of companies making their reinsurance contracts in California. The right of a state to foster its own domestic industries by its taxing system has been sustained by this Court.[5]

This Court has also frequently sustained the right of a state to impose conditions on foreign corporations in order to favor its own corporations.[6] If a state did not have this privilege it could not protect the domestic business of its own corporations from undesirable competition by foreign corporations. The State of California has the constitutional right to limit the privileges of its own corporations and to reserve the right to control their privileges and to define and limit their activities.[7] If California has the lawful constitutional right (as this Court has many times said it has) to impose conditions upon foreign corporations so as to protect domestic corporations, its own elected legislative representatives should be the judges of what is reasonable and proper in a democracy.

With reference to a corporate tax imposed by the State of Louisiana, this Court has said: "The appellants, by incorporating in some other State, or by spreading their business and activities over other States, cannot set at naught the public policy of Louisiana (California?). . . . The policy Louisiana (California?) is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other States who conduct the same business within her borders, and this irrespective of

[4] Brandeis, J., dissenting, Liggett Co. *v.* Lee, 288 U. S. 546.

[5] New York *v.* Roberts, 171 U. S. 658; Magnano Co. v. Hamilton, 292 U. S. 40; Fox *v.* Standard Oil Co., 294 U. S. 87; Aero Mayflower Transit Co. *v.* Georgia Commissioners, 295 U. S. 285; Alaska Fish Co. *v.* Smith, 255 U. S. 44, 48.

[6] Prudential Insurance Co. *v.* Cheek, 259 U. S. 530, 536; Pemlina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 189.

[7] Fifth Avenue Car Co. *v.* New York, 221 U. S. 467; Stone *v.* Mississippi, 101 U. S. 814, 820.

whether the evils requiring regulation arise solely from operations in Louisiana (California?) or are in part the result of extra-State transactions."[8]

But it is contended that the due process clause of the Fourteenth Amendment prohibits California from determining what terms and conditions should be imposed upon this Connecticut corporation to promote the welfare of the people of California.

I do not believe the word "person" in the Fourteenth Amendment includes corporations. "The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law."[9] This Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted.[10] Only recently the case of *West Coast Hotel Company* v. *Parish*, 300 U. S. 379, expressly overruled a previous interpretation of the Fourteenth Amendment which had long blocked state minimum wage legislation. When a statute is declared by this Court to be unconstitutional, the decision until reversed stands as a barrier against the adoption of similar legislation. A constitutional interpretation that is wrong should not stand. I believe this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.

Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection. The historical purpose of the Fourteenth Amendment was clearly set forth when first considered by this Court in the *Slaughter House Cases*, 16 Wall. 36, decided April, 1873—less than five years after the proclamation of its adoption. Mr. Justice Miller speaking for the Court said:

"Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value, while they

[8] Atl. & Pac. Te Co. *v.* Grosjean, 301 U. S. 427.

[9] Stone and Car ozo, JJ., concurring, St. Joseph Stock Yards Co. *v.* United States et al., 298 U. S. 38 at 94.

[10] See Collection of cases, Notes 1, 2, 3 and 4, Dissenting Opinion of Justice Brandeis, Burnet *v.* Coronado Oil and Gas Co., 285 U. S. 406, 407, 408, 409.

had lost the protection which they had received from their former owners from motives both of interest and humanity. . . .

"These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced . . . the conviction that something more was necessary in the way of Constitutional protection to the unfortunate race who have suffered so much. . . . (Congressional leaders) accordingly passed through Congress the proposition for the *fourteenth amendment, and . . . declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection,* until they ratified that article by a formal vote of their *legislative bodies.*" (p. 70.)

Certainly, when the Fourteenth Amendment was submitted for approval, the people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations. This Court, when the *Slaughter Houses* cases were decided in 1873, had apparently discovered no such purpose. The records of the time can be searched in vain for evidence that this Amendment was adopted for the benefit of corporations. It is true that in 1882, twelve years after its adoption, and ten years after the *Slaughter Houses* cases, *supra,* an argument was made in this Court that a journal of the joint Congressional Committee which framed the Amendment, secret and undisclosed up to that date, indicated the Committee's desire to protect corporations by the use of the word "person."[11] Four years later, in 1886, this Court in the case of *Santa Clara County* v. *Southern Pacific Railroad,* 118 U. S. 394, decided for the first time that the word "person" in the Amendment did in some instances include corporations. A secret purpose on the part of the members of the Committee, even if such be the fact, however, would not be sufficient to justify any such construction. The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the

[11] (San Mateo County v. Southern Pacific Railroad, 116 U. S. 138.) See, Benj. B. Kendrick, "Journal of the Joint Committee on Reconstruction" (1914, New York); Howard J. Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale Law Journal 371; Donald Barr Chidsey, "The Gentleman from New York—A Life of Roscoe Conklin," Yale University Press (1935).

freedom of a race from slavery. Justice Swayne said in the *Slaughter Houses Cases, supra,* that "by 'any person' was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color." Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings.

The language of the Amendment itself does not support the theory that it was passed for the benefit of corporations.

The first clause of Section 1 of the Amendment reads: "All *persons* born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." Certainly a corporation cannot be naturalized and "persons" here is not broad enough to include "corporations."

The first clause of the second sentence of Section 1 reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." While efforts have been made to persuade this Court to allow corporations to claim the protection of *this* clause, these efforts have not been successful.[12]

The next clause of the second sentence reads: Nor shall any State deprive any *person* of life, liberty or property without due process of law; . . ." It has not been decided that this clause prohibits a state from depriving a corporation of "life." This Court has expressly held that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of *natural, not artificial persons.*"[13] Thus, the words "life" and "liberty" do not apply to corporations, and of course they could not have been so intended to apply. However, the decisions of this Court which the majority follow hold that corporations are included in this clause insofar as the word "property" is concerned. In other words, this clause is construed to mean as follows:

"Nor shall any State deprive any *human being* of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law."

The last clause of this second sentence of Section 1 reads: "nor deny to any person within its jurisdiction the equal protection of

[12] Selover, etc. *v.* Walsh, 226 U. S. 112, 126.

[13] Western Turf Association *v.* Greenburg, 204 U. S. 363.

the laws." As used here, "person" has been construed to include corporations.[14]

Both Congress and the people were familiar with the meaning of the word "corporation" at the time the Fourteenth Amendment was submitted and adopted. The judicial inclusion of the word "corporation" in the Fourteenth Amendment has had a revolutionary effect on our form of government. The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, (and all administrative actions under them) to censorship of the United States courts. No word in all this amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate corporations.

The second section of the Amendment informed the people that representatives would be apportioned among the several states "according to their respective numbers, counting the whole number of *persons* in each State excluding the Indians not taxed." No citizen could gather the impression *here* that while the word "persons" in the second section applied to human beings, the word "persons" in the first section *in some instances* applied to corporations. Section 3 of the Amendment said that "no *person* . . . shall be a Senator or Representative in Congress", (who "engaged in insurrection"). There was no intimation *here* that the word "person" in the first section *in some instances* included corporations.

This Amendment sought to prevent discrimination by the states against classes or races. We are aware of this from words spoken in this Court within five years after its adoption, when the people and the courts were personally familiar with the historical background of the Amendment. "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[15] Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent

[14] Gulf, etc., Ry. Co. *v.* Ellis, 165 U. S. 150, 154.

[15] Slaughter House Cases, *supra.*

invoked it in protection of the negro race, and more than fifty per cent asked that its benefits be extended to corporations.[16]

If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own State boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An Amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.

I believe the judgment of the Supreme Court of California should be sustained.

[16] Charles Wallace Collins, "The Fourteenth Amendment and the States", Boston (1912), page 138.